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Tuesday, September 05, 2006

An international non-delegation doctrine

The D.C. Circuit has held that Congress cannot delegate lawmaking power to an international organization. The case is a lawsuit brought by an environmental group against the U.S. Environmental Protection Agency (EPA) for an alleged violation of the Montreal Protocol. The group argued that the EPA violated "decisions," or agreements that have been negotiated by party countries since ratification of the Protocol, defining "critical uses" which would be exempt from the general ban on the ozone-eating chemical methyl bromide. Some choice quotes:

> If the "decisions" [further agreements made after the treaty was ratified] are "law" – enforceable in federal court like statutes or legislative rules – then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution. The Supreme Court has not determined whether decisions of an international body created by treaty are judicially enforceable. But there is a close analogy in this court...we held that rulings of the [International Court of Justice] do not provide "substantive legal standards for reviewing agency actions," because the rulings, though authorized by the ratified treaty, were not themselves self-executing treaties. [citations elided]....
>
> A holding that the Parties' postratification side agreements were "law" would raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers...
>
> To illustrate, suppose the President signed and the Senate ratified a treaty with Germany and France to conserve fossil fuel. How this is to be accomplished the treaty does not specify. In a later meeting of representatives of the signatory countries at the United Nations, a consensus is reached to lower the speed limits on all major highways of the signatory nations to a maximum of 45 miles per hour. No one would say that United States law has thus been made.

The court makes an interesting distinction between using an international organization's "decisions" to interpret ratified (and thus binding) treaty language and enforcing them as law itself:

> Like any interpretive tool ... the "decisions" are useful only to the extent they shed light on ambiguous terms in the Protocol. But the details of the critical-use exemption are not ambiguous. They are nonexistent. The "decisions" do not interpret treaty language. They fill in treaty gaps.

The court then makes a good analogy from contract law to treaty law:

Pages

- Home

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> Article 2H(5) thus constitutes an "agreement to agree." The parties agree in the Protocol to reach an agreement concerning the types of uses for which new production and consumption will be permitted [i.e. the critical use exemption], and the amounts that will be permitted. "Agreements to agree" are usually not enforceable in contract. ("A treaty is in its nature a contract between . . . nations."). And the fruits of those agreements are enforceable only to the extent that they themselves are contracts. There is no doubt that the "decisions" are not treaties. [citations elided]

The court goes on to interpret the language of the Montreal Protocol to be consistent with the non-delegation doctrine, and thus as not authorizing courts to enforce post-ratification "consensus agreements": they "are international political commitments rather than judicially enforceable domestic law."

This is a great decision, not because it preserves "sovereignty," but because it recognizes that a strong non-delegation doctrine is crucial to allocating Constitutional powers where the Framers intended them to be allocated.

For more on the non-delegation doctrine, see my paper origins of the non-delegation doctrine. HT: Opinio Juris.

Posted by Nick Szabo at 10:03 PM

1 comment:

Rhea said...

In your paper that's an amazing debate among Madison et. al. on the non-delegation doctrine. Thanks for recovering this important part of history. But the debate seems to leave us with no bright-line rule for determining whether a delegation of law-making power has occurred or not.

The rule must be somewhere between merely prescribing a "principle" to follow (too broad of a delegation according to Madison et. al.) and specifying the minutest detail and decision. The latter would be far too impractical, even for Madison, who didn't declare Congress should have to define every twist and turn of the postal routes, just the general major towns on the route. But where's the rule to define a satisfactory point in between, somewhere within this hierarchy of rules?

11:53 PM

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- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ▼ 2006 (130)
  - ► December (4)
  - ► November (7)
  - ► October (15)
  - ▼ September (15)
    - More on arbitrary detainment and habeas corpus sus...
    - Arbitrary detainment and suspension of habeas corp...
    - A's win the West!
    - Patent infringed by cat?
    - Why Kelo was way off
    - Incorporation of the Second Amendment
    - Blown down in the wind: property rights and the pu...
    - Artificial atoms
    - Due process property rights
    - Semayne's Case: liberty of the house
    - NASA urban legends
    - Another good use for pseudonyms
    - Law of the dominant paradigm
    - An international non-delegation doctrine

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- August (20)
- July (5)
- June (10)
- May (4)
- April (3)
- March (11)
- February (10)
- January (26)

- 2005 (44)

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